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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1310

JAMES J. DRISCOLL, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the First Circuit entered in the above-entitled cases on January 31, 1966.

The petitioners are James J. Driscoll, Edward J. Geraghty, James L. Maguire, Paul J. Watson, and Martin J. Flaherty.[1] The first four-named petitioners were joined in one indictment and tried together in the District Court, and their appeals heard by the Court of Appeals on a

[1] Two other defendants below, William A. Yakabowicz and William J. Dwyer, whose appeals to the Court of Appeals were consolidated with those of the first four-named petitioners, are not petitioners here.

printed consolidated record appendix. The last-named petitioner, Flaherty, was prosecuted by separate information and trial before another judge, and his conviction reviewed separately by the Court of Appeals. However, two of the three issues presented here are shared by him.

Opinions Below

There was no opinion in the United States District Court for the District of Massachusetts in any of the cases.

The opinions of the Court of Appeals for the First Circuit are not yet reported, but are annexed hereto as Appendices A (*Driscoll, et al.* v. *United States*) and B (*Flaherty* v. *United States*).

Judgments Below

The judgments of the United States District Court for the District of Massachusetts were entered in the *Driscoll, et al.* case on January 5, 1965 (Dr. R. 3)[2] and are set out at Dr. R. 32-36. In the *Flaherty* case, the judgment of the trial court was entered on May 27, 1965 (Fl. R. 2)[3] and is set out at Fl. R. 88-89.

The judgments of the Court of Appeals for the First Circuit were entered in all cases on January 31, 1966, and are annexed hereto as Appendix C.

Jurisdiction

The judgments sought to be reviewed are dated, and were entered, January 31, 1966.

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[2] *Dr. R.* will hereinafter be used as a reference to the Consolidated Record Appendix to Brief for Appellant filed below in the *Driscoll, et al.* case.

[3] *Fl. R.* will hereinafter be used as a reference to the Consolidated Record Appendix to Brief for Appellant filed below in the *Flaherty* case.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254 (1) and Rule 22 (2).

Questions Presented

1. Do the registration provisions of the wagering tax laws violate the constitutional privilege against self-incrimination, particularly when applied to persons alleged by the Government to have been joint venturers, employees, or conspirators in the wagering business. (All petitioners).

2. In a prosecution for wilful failure to purchase a wagering tax stamp, is the defendant entitled to an instruction on the lesser-included, non-wilful offense, where no evidence has been offered by him on the issue of wilfulness. (All petitioners except Driscoll and Flaherty).

3. Should a count charging the defendant both as principal and agent in the wagering business be dismissed for duplicity. (All petitioners).

Statutes Involved

The statutes involved in these cases are 18 U.S.C.A. §§ 371, 1084, 1952, 1953, and 26 U.S.C.A. §§ 4401, 4411, 4412, 7203, 7262, and Mass. Gen. Laws, Ch. 271, Secs. 7, 15. The pertinent text of these statutes, as well as regulations and rules herein involved, are annexed hereto as Appendix D.

Statement of the Case

On November 4, 1964, an indictment in nine counts was returned against petitioners Driscoll, Geraghty, Maguire, and Watson. Count One charged these four petitioners with conspiring to defraud the Government of wagering taxes in violation of 18 U.S.C. §371. The fifth petitioner here,

Flaherty, and five others were named as co-conspirators but not defendants in this count. (Dr. R. 6-9).

Counts Two, Four, Six, and Eight, respectively, charged the same four petitioners with the substantive offense of wilfully failing to pay the special occupational tax required by 26 U.S.C. 4411; in violation of 26 U.S.C. 7203 (Dr. R. 9-10).

Counts Three, Five, Seven, and Nine, respectively, were dismissed by the trial court (Dr. R. 2) and are not in issue here.

On the same date, November 4, 1964, an information in two counts was returned against the petitioner Flaherty, charging him in the first count with the wilful failure to pay the special occupational tax. (Fl. R. 3); the second count is not in issue here because ordered dismissed by the Court of Appeals.

Each petitioner pleaded not guilty and duly moved to dismiss the counts in which he was named as a defendant. All substantive counts were challenged for duplicity in that each such count charged the defendant as both a principal and an agent. (Dr. R. 10-11; Fl. R. 4). Moreover, the petitioners sought dismissal of all counts for the reasons that the statute on which the indictment and information were founded is unconstitutional on its face and in its application to these petitioners. (Dr. R. 11; Fl. R. 4-5). The motions on all these grounds were denied by the two trial judges involved.

At the joint trial of Driscoll, Geraghty, Maguire, and Watson, with respect to the substantive counts of wilful failure to purchase the wagering tax stamp, all the defendants requested, and were denied, an instruction to the effect that the jury could find any of them guilty of the lesser-included offense, namely, the non-wilful failure to pay the special tax, under 26 U.S.C.A. §7262 (Dr. R. 29, 31). There was evidence on the issue of wilfulness that

Geraghty, Maguire, and Watson had been advised of the requirements of the wagering tax laws in 1957 and 1960 (the date of the alleged offense was December, 1963) and that Watson and Driscoll had committed acts in concealment of the unlawful lottery.[4]

Driscoll, Geraghty, Maguire, and Watson were all acquitted by the jury on the conspiracy count and convicted on the respective counts charging each with the substantive offense of failure to purchase the wagering tax stamp. Driscoll was awarded a new trial on the lesser offense issue and the convictions of the other three were affirmed by the Court of Appeals. That court also dismissed the count charging Flaherty with the wilful failure to register and, on an evidence issue, ordered a new trial on the count charging the wilful failure to purchase the tax stamp. In all cases, the Court of Appeals upheld the refusal of the trial judges to dismiss the charges in their entirety.

Since the Court of Appeals reversed the trial court's refusal to give Driscoll the lesser offense instruction, that issue is not here raised by Driscoll. Moreover, since the trial judge before whom Flaherty was tried gave the requested instruction, the issue is absent also in Flaherty's petition.

Reasons For Granting the Writ

I. The Lower Court Has Decided an Important Question of Constitutional Law Which Is Now Pending before This Court

At the session of March 21, 1966, this Court granted certiorari in *Costello* v. *United States*, No. 826, on the following questions:

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[4] The evidence relating to the issue of wilfulness was printed in its entirety by the Government as a record appendix to its brief in the Court of Appeals and appears at Dr. R. 63-76.

1. Do the federal wagering tax statutes violate defendant's Fifth Amendment privilege against self-incrimination?

2. Should *U. S.* v. *Kahriger*, 341 U.S. 22 (1953), and *Lewis* v. *U. S.*, 348 U.S. 419 (1955), upholding the constitutionality of the federal wagering tax laws, be reconsidered and overruled in view of this Court's recent decision in *Albertson, et al.* v. *Subversive Activities Control Board*, U.S. , 86 S. Ct. 194 (decided Nov. 15, 1965)?

Precisely the same questions have been preserved and presented here.[5] Although not mentioned by the court below, the *Albertson* case, which was decided after filing of the petitioners' brief below, was briefed by the Government and argued by all parties.

Moreover, since four of the petitioners were charged as defendants, and the fifth petitioner as a co-conspirator, in a conspiracy count, and, since all five petitioners were charged in substantive counts as employees of another person, the instant cases present the further question whether, as applied to these petitioners, the registration requirements of the wagering tax laws compel disclosure of incriminatory evidence of a *past* conspiracy to engage in gambling in the future. The possibility of such a situation was first suggested by Justice Black, dissenting in *Lewis*, 348 U.S. at 424, 75 S. Ct. at 419:

> "And for conspiring with his employers or employees to promote a lottery even in the future, which compulsory registration is designed to reveal, petitioners could be punished. . . ."

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[5] These questions have been presented also in three other, pending petitions: No. 848, *Markis* v. *U. S.*; No. 849, *Piccioli* v. *U. S.*; and No. 951, *Moretti* v. *U. S.*

We respectfully submit, therefore, that the importance of the question of constitutionality has already been established by this Court's grant of review in *Costello* and that the further question of constitutionality as applied to these petitioners deserves review in its own right.

II. Questions of Broad Importance to the Administration of Criminal Justice in the Federal Courts Are Presented

A. *Lesser-Included Offense Instruction*[6]

We shall not presume to estimate the number of federal criminal trials in which the offense charged is capable of reduction to a lesser offense by the elimination of a single element of the crime. It is enough to say that the number must surely be a substantial portion of the total. Yet, there are only four reported opinions of this Court on the subject. Two of them were decided in the last century, namely, *Sparf* v. *United States*, 156 U.S. 51, 15 S. Ct. 273 (1895), and *Stevenson* v. *United States*, 162 U.S. 313, 16 S. Ct. 839 (1896). Both these cases deal with the question of reduction from murder to manslaughter and, when read together, leave no doubt that, so long as there is "*any* evidence fairly tending to bear upon the issue of manslaughter, it is the *province of the jury* to determine from all the evidence what the condition of mind was, and to say whether the crime was murder or manslaughter." (emphasis added). 162 U.S. at 323, 16 S. Ct. at 843.

In *Stevenson*, this Court held that there was indeed some

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[6] This question has been presented also in another pending petition, No. 848, *Markis* v. *U. S.* (see footnote 5, *supra*), and, on January 17, 1966, in No. 100, *Altiere* v. *U. S.*, a petition presenting the same question was granted, the judgment vacated, and the case remanded for further proceedings.

evidence justifying a reduction to manslaughter and that the question should have been submitted to the jury. On the other hand, in *Sparf*, the Court held that, "on account of the *absence of all evidence* tending to show that the defendants were guilty of manslaughter, they [*i.e.*, the jury] could not, consistently with law, return a verdict of guilty of that crime." (emphasis added). 156 U.S. at 101, 15 S. Ct. at 293.

The only modern Supreme Court cases on the subject are *Berra* v. *United States*, 351 U.S. 131, 76 S. Ct. 685 (1956), and *Sansone* v. *United States*, 380 U.S. 343, 85 S. Ct. 1004. In *Berra*, the Court held merely that the offense on which an instruction was requested was not included within the offense charged. Similarly, in *Sansone*, it was held that the lesser offense instruction was not proper where the defendant had conceded the existence of the additional elements constituting the greater offense and had thus created an "overlapping" of offenses.

In the instant case, the question considered by the court below was whether petitioners Geraghty, Maguire, and Watson were required to come forward with evidence of the *absence* of wilfulness in order to create the disputed issue of fact which would have entitled them to an insruction on the lesser offense, namely, the non-wilful failure to pay the special tax. 26 U.S.C.A. §7262. The court then proceeded to hold, in effect, that an issue of fact is "disputed" within the meaning of *Sansone* only if, in the judgment of the trial court, the evidence on the issue is fairly in balance. On the other hand, according to the opinion of the lower court, the issue is not "disputed" if the Government, in the judgment of the court, has made out a compelling case of wilfulness which is uncontroverted on the evidence.

No such principle, we submit, can be extracted from any of the opinions of this Court on the subject. On the con-

trary, the opinions in *Stevenson* and *Sparf* are quite explicit to the effect that it is not the function of the trial court to weigh the evidence in determining whether to submit the lesser offense to the jury. What the court below failed to grasp was that, in *Stevenson* and *Sparf*, some affirmative evidence in excuse or mitigation was required to *reduce* the offense from murder to manslaughter, whereas, in the instant cases, affirmative evidence of wilfulness was required to *raise* the offense from a non-wilful to a wilful violation. Accordingly, in *Sparf* and *Stevenson*, it was necessary for the court to determine whether there was any evidence at all to justify submission of the *lesser* offense to the jury. On the other hand, the only issue here for determination by the court should have been whether there was sufficient evidence to justify submission of the *greater* offense to the jury. The court below should never have been concerned with the question whether there was evidence of non-wilfulness. Much less should it have concerned itself with the weight or credibility of the evidence on the issue.[7]

The interpretation placed on the opinions of this Court by the lower court introduces an entirely new and erroneous concept into the law. Whenever a lower court holds, as the court below has in this case, that the credibility and weight of the evidence is a judicial function, even in a limited area of a criminal trial, then, we submit, review by this Court is warranted almost as a *matter of course*.

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[7] Of course, if, by stipulation or judicial admission, the petitioners had removed the element of wilfulness from the area of dispute into which it was originally placed by the plea of not guilty, the lesser offense would then have been properly withheld from the jury.

B. *Duplicity: The Charge as Both Principal and Agent*

In *Morgan* v. *Devine*, 237 U.S. 632, 641, 35 S. Ct. 712, 715 (1915), the Court said:

> "... this court has settled that the test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes."

In *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182 (1932), approved in *Gore* v. *United States*, 357 U.S. 386, 388, 78 S. Ct. 1280, 1282 (1958), the Court said:

> "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."

Here, the "act or transaction" involved is the physical receipt of wagers; the "distinct statutory provisions" are Paragraphs 2 and 3 of 26 U.S.C.A. §4412(a); and the difference in the proof required is that, under Paragraph (2), the defendant's status as a principal and his failure to register his place of business and the names and addresses of his agents must be proved, whereas, under Paragraph (3), his status as an agent and his failure to register the names and address of his principals must be proved. The analogy with *Blockburger* is virtually perfect.

The lower court, however, took a different view and said:

> "The present cases come within the authority of cases which state that where a statute specifies several ways in which an offense may be committed, they may be charged in one indictment or count, using the conjunctive to connect them."

Concededly, there are many cases supporting this statement. On the other hand, it is difficult to reconcile it with the language of the opinions in *Morgan* and *Blockburger*. In view of the frequency with which Government prosecutors string together in one count charges of the various acts condemned by related, but distinct, statutory provisions, it is submitted that the instant cases offer the Court an excellent opportunity to eliminate a constantly recurring subject of controversy in the trial courts.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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